TESTIMONY

by Stan Soloway
President
Professional Services Council

before the

COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

June 26, 2003

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Mr. Chairman, members of the Committee, thank you for the opportunity to testify before this Committee again as you continue your review of public/private competitions, specifically those conducted under OMB Circular A-76. This issue has been at the forefront of Congressional interest for several years and the Professional Services Council appreciates your continued leadership in this important public policy area.

My name is Stan Soloway and I am president of the Professional Services Council (PSC). PSC is the leading national trade association representing the professional and technical services industry doing business with the Federal government. PSC's approximately 150 member companies perform more than $100 billion in contracts annually with the federal government and other entities, from information technology to high-end consulting, engineering, scientific and environmental services.

Today, across the nation, and around the world, hundreds of thousands of hard working Americans are busy supporting the many and varied missions of virtually every government agency. They are public employees, private sector employees, employees of non-profits, and of universities. They are mechanics, scientists, engineers and clerks; they are software designers, management experts, security guards, social scientists and more. They are the work force that ensures the delivery of government services, supports our troops abroad, fights hunger and AIDs, searches for the next medical breakthrough, and works to help modernize government systems to enable an ever-higher quality of service to the American people.

Despite the hyperbolic rhetoric to the contrary, the truth is that this diverse workforce, public and private, has repeatedly demonstrated its commitment to service, to excellence, and to this nation.

It is in the context of that reality that I would like to address the principal focus of this hearing -- the process for determining the best source for performance of government functions that are commercial in nature.

I had the privilege of serving on the Congressionally-mandated Commercial Activities Panel, chaired by the Comptroller General. The panel itself had representation from all stakeholders and, needless to say, the differences between some of us were and remain significant. At the same time, as this committee has heard from the Comptroller General directly, the Panel

achieved unanimity on ten overarching principles to govern sourcing policy. In previous hearings, we have discussed those principles in some detail so I will not repeat them here. Those sourcing principles, which were designed to be taken as a unified whole, can be summed up as follows: first, sourcing is and must be viewed as a strategic process, and not one governed by arbitrary quotas or goals, or, for that matter, arbitrary limitations; second, sourcing policy must be founded on the tenet of equal rights and equal responsibilities for all bidders, public and private.

As such, the Commercial Activities Panel unanimously opposed the kind of targeted, arbitrary limitations currently being aimed at the Corps of Engineers, the FAA, and the Department of Interior. The CAP unanimously recognized the fundamental importance of competition as a critical strategic tool. These efforts are not only arbitrary in nature and go in the opposite direction; they also severely inhibit the agency's ability to utilize competition to drive higher performance and efficiency.

OMB May 29 Revisions

The revisions to Circular A-76 that were issued by OMB on May 29 seek to bring the public/private competition process into closer alignment with those unanimous, common sense, principles of the CAP. The revisions seek to simplify what the CAP found to be a hopelessly arcane and outdated process; and they seek to bring the public-private competition process into closer alignment with the processes contained in the Federal Acquisition Regulation that governs virtually all other government procurement and which is based on that vital tenet of equal rights and equal responsibilities. The question before the Committee is whether the revisions to A-76 achieve those goals?

To that, my short answer is that the revisions represent a significant and important step forward. They contain a number of important improvements to the process that do not bias the outcome in any way but which do enable agencies to conduct a more meaningful and effective competition. We compliment the former director of OMB, and OFPP Administrator Styles, for their work.

At the same time, there remain some very important areas in which improvement is still badly needed. The CAP report recognized the need for mid-course corrections and we hope that OMB will move quickly to address these remaining issues.

Expanding Best Value Authority

As you know, best value contracting offers the government the ability to consider both cost and quality factors in its sourcing decisions—which was also a specific and unanimous recommendation of the Commercial Activities Panel. Best value is not one strategy, it is an entire spectrum of strategies, including low cost/technically acceptable, that enables the matching of a specific acquisition strategy to a specific requirement. The best value spectrum recognizes that, particularly for relatively non-complex, low technology requirements, cost will dominate the government's source selection factors; for more complex high technology requirements, cost, while always a significant factor, is only one of the important evaluation factors to be considered by the agency. The best value process does not eliminate cost as a factor;

it simply recognizes that there are quality, technical, and other performance issues that must also be considered.

Until the A-76 revisions were released on May 29, about 98% of all government procurements had the authority to utilize the full range of best value strategies; only procurements conducted under A-76 were prohibited from exercising this common sense buying strategy. Thus, among the most important changes in the revisions to the OMB Circular is the creation of a modified form of "best value" contracting exclusively for public-private competitions. We applaud that. It is certainly a positive step.

However, even when the use of best value techniques are permitted under the new Circular, it stops well short of adopting the FAR process available for all other types of procurements. Under the Circular, when the "trade-off" process is utilized, cost must always represent at least 50% of the source selection evaluation criteria. In making source selections, particularly for requirements of some complexity, it is not at all uncommon to have five or six source selection criteria, of which cost is always one. In most cases, cost is the most important factor. But when there are several other factors to be considered, it is easy to conceive of circumstances in which cost, while clearly an important evaluation factor, does not make up 50% of the overall source selection criteria. By imposing this arbitrary 50% requirement, the administration is thus significantly limiting the ability of agency procurement professionals to make the right business decisions for the government.

We are disappointed that the revision stopped significantly short of explicitly adopting in full the Commercial Activities Panel's unanimously agreed to recommendation that best value techniques should be available to all agencies to use when they determine appropriate for a specific acquisition. We have learned the hard way that buying cheap is not always the smart way to buy. Under the new Circular, the authority for using best value techniques remains limited principally to information technology requirements, new work, or already contracted work. Why does the Administration's grant of authority stop there? It ought to be clear that there are many services that should not be bought based solely on lowest cost. Moreover, if all existing contracts (not just those limited to information technology) performed by the private sector can be competed under best value criteria, why does the same not apply to competitions for work currently performed by the government?

Interestingly, Section 812 of the Senate passed version of the FY 04 Defense Authorization bill, would allow the Department of Defense to make its competitive sourcing decisions in a public-private competition for the acquisition of information technology services on the basis of best value criteria. We recommend, in line with the recommendations of the Commercial Activities Panel, that the Department of Defense be authorized to evaluate all public-private competitions on any basis that is appropriate for achieving the requirement and that the use of best value not be limited to IT services. Consistent with the CAP recommendations, Congress should amend 10 USC 2462 (a) to permit DoD to conduct its A-76 competitions in the same manner as every other federal agency.

Best value is not new, it is well proven, and limiting its use for one subset of government procurement simply does not serve the government's best interests.

In addition, the House passed Defense Authorization bill prohibits DoD from initiating any competitive sourcing studies or conducting any competitions under any revisions to the OMB Circular, until 45 days after the Secretary of Defense submits a report to Congress on any impacts or effects of any revisions. The OMB Circular was issued after the bill passed the House, and the impact and effects of the OMB policy revisions as they affect all federal agencies are now clear, eliminating the need for a delay or any such report.

Cost Differential

The revisions also require that a 10% cost differential be added to the personnel costs of the non-incumbent bidders. By requiring this automatic application of the cost differential, particularly when coupled with the mandatory minimum 50% cost evaluation factor, we are concerned that the Circular falls well short of the goal of bringing real best value opportunities to even this subset of public/private competitions. In the end, the flexibility any smart buyer needs when making decisions about complex requirements will have been significantly and unnecessarily reduced.

Treatment of Bidders

The May 29 revision makes important improvements over the past Circular towards the goal of treating all public and private sector offerors alike. Under the old A-76 process, public and private bidders were treated very differently and subjected to very different source selection criteria. The revised A-76 requires all bidders, public or private, to respond to the same solicitation, submit their bids within the same timeframe, be evaluated on the same evaluation criteria, and enter into a binding agreement—either a contract for companies or a Letter of Obligation for government activities—under which performance will continually be monitored and the work appropriately subjected to continual competitive pressures. This entire set of changes reflects a very basic and critical commitment to fairness and to treating all bidders the same – and a good faith effort to implement the foundation principal of the CAP recommendations.

These changes should simplify the agency's independent evaluation process, speed up the entire acquisition process, minimize internal conflicts and enhance the competitive process.

Timelines for Completing Studies

Further, the revisions establish tough timelines for agencies to complete A-76 studies. Much has been said about the time limits in the Circular being overly burdensome. In practical terms, the Circular really provides up to 18 months for standard procurements from start to required completion. While this timetable may be aggressive, it does not seem to be overly egregious. It is important to note that the clock doesn't start ticking until the competition is announced. Much of the planning that used to take place after the announcement of an A-76 study is now to be completed prior to the agency announcement of a competition.

It is interesting to note that at DoD, the agency with by far the most experience with the prior A-76 process, the simpler and smaller single function studies have traditionally taken significantly longer—nearly 30 months on average. For their larger, more complex studies, the DoD average has been closer to 20 to 22 months. This suggests that the timelines in the Circular are reasonable. We also support establishing tough stretch goals for completing these competitions to minimize any uncertainty for the existing workforce, reduce bidding expenses for all participants, and facilitate the agency mission execution.

Streamlined Process

Another significant area of change in the revised A-76 is the new policy governing so-called "direct conversions" where work currently being performed by federal employees is competed only among private sector firms. The new Circular essentially eliminates direct conversions per se and puts in its place a logical set of requirements that enables agencies to utilize extensive market research, price analyses, and other tools, to include competition if they wish, for functions involving fewer than 65 employees.

On the face of it, it is difficult to argue with this new process. There are many effective tools available that enable agencies to make reasoned and thoughtful sourcing decisions on small sets of activities without going through the standard A-76 competitive process. Some federal employee organizations have already complained that the new process is nothing more than a license for agencies to find excuses to directly convert work. Ironically, similar concerns are raised by the private sector. We have seen scores of cases in which agencies have studiously sought to avoid utilizing the competition tool for making sourcing decisions.

As but one example, over the past three years the U.S. Navy has entirely cancelled 45% of all of its announced A-76 studies. Moreover, according to the Department of Defense, 49 of the 50 streamlined studies conducted at DoD between 1997 and 2001 under the prior A-76 process resulted in an in-house "win." That not only defies all odds but also represents a much more significant red flag for the contractor community than it should for the government employee unions.

In our view, the new "streamlined process" is not, in and of itself, the problem, despite our concerns that it could be used as an excuse to avoid competition. However, we believe that more guidance is needed regarding how this streamlined process will be monitored and evaluated, to ensure that it is not manipulated or used as a tool for inappropriate in-sourcing or outsourcing.

The streamlined process does contain a variety of certification and disclosure requirements. But the information now required to be included in the public record is insufficient and should be strengthened. In addition, the guidance given to agencies on the tools that are appropriate for making their strategic decisions is too general. For example, agencies should be reminded that conducting market research by using price lists such as those contained on the GSA schedules, while appropriate as a source of information, is not, itself, adequate since the prices contained on the schedules are initial prices that schedule holders may well reduce during the competitive process.

Contesting Decisions

The revision contains modest but significant changes to the process for administratively contesting decisions made throughout a public-private competition. Previously, the A-76 Circular contained its own appeal process that was separate from the administrative or agency level protest processes contained in the Federal Acquisition Regulation. To simplify matters, the Circular provides that the agency level protest procedures contained in FAR Part 33 is the only appeals process available to challenge an agency action. Further, the Circular explicitly authorizes appeals from only three parties, all of whom had similar appellant rights under the old A-76: the affected contractors, the government's "agency tender official," and the affected federal workforce, through its elected representative.

The significant question now being asked, and currently the subject of a June 13, 2003 General Accounting Office (GAO) request for public comment, is whether protest rights at the GAO -- beyond the agency appeal -- should be extended to the government or the federal workforce? More specifically, who qualifies under the Competition in Contracting Act's standard of "interested party" for GAO to accept a protest? As this Committee well knows, standing has been limited to those individuals with the authority to sign and certify a bid and to sign and be liable for performance under a contract.

PSC will be submitting extensive comments to GAO on this critically important issue. Under the new A-76 Circular, we think it is possible that GAO could determine that an agency tender official—the government official authorized to commit the government through its bid and to commit the government to performance as the signatory to the Letter of Obligation—qualifies for standing to protest before the GAO. For the most part, the revised A-76 places on this agency tender official the same rights and responsibilities as shouldered by all other bidders.

On the other hand, it is inconceivable to us that the GAO could rule that federal employees, either as individuals or through their elected representative, would be or should be granted such standing. While companies have the standing to protest, their workforce, be they individuals or their unions, do not have such standing. Although employees are clearly affected by decisions made in the course of a competition, they do not have the legal or financial liability for the bid submitted or for post-award performance. This is true of individuals and of unions, be they public or private.

The issue of whether to grant standing to an Agency Tender Official involves complex legal issues—including questions of how the government, in essence, can sue itself. We await GAO's opinions. By contrast, the issue of granting standing to individuals or unions, public or private, to protest before GAO or the courts is actually quite clear.

Additional Enhancements Needed

I would like to offer recommendations for further enhancements we believe need to be addressed quickly by OMB to make the A-76 process a process that really works for the government. I mentioned earlier the importance of providing more specific guidance on what is and is not

acceptable in the way of research and analysis for the streamlined decisions involving 65 or fewer FTE's.

Next, it is important that the A-76 costing methodologies be substantially revised. One of the unintentional ironies of the revised A-76 process is the requirement that the government conduct a cost realism analysis on both public and private bids. Indeed, private bids have always been subjected to a cost realism analysis, whereas government Most Efficient Organizations, or MEOs, under A-76, have been subjected to a much less rigorous cost analysis. At the same time, the A-76 cost manual is designed to create a model of a government Most Efficient Organization; and its use is required under the new A-76 process. However, there is a vast difference between a cost model and cost realism. A cost model reflects what things should cost; cost realism is geared toward what they actually will cost. While any cost discrepancies should emerge during post-award audits required under the Circular, the whole point of a cost realism analysis is to identify these dichotomies in advance. This is a continuing weakness of the A-76 process that must be addressed if we are to have a process that is fair to all and delivers the best outcomes for the government.

We are also concerned that even under the best value process provided for in the revised Circular, the past performance of only one party—the government—may not be considered. Congress and successive administrations have made clear their belief, one that we strongly share, that past performance is often the most important indicator of likely success or failure. It is appropriate that past performance must now be considered in virtually all government procurements. As a matter of policy in many agencies, past performance now accounts for at least 25% of the source selection factors for every private/private procurement. However, under the A-76 revision, the consideration of past performance for the government MEO is explicitly prohibited the first time around. This makes leveling the competitive playing field exceedingly difficult.

The Professional Services Council has long been one of the most outspoken supporters of using verifiable past performance in all procurements and we certainly would not advocate that past performance not be a factor in A-76 competitions. But if it is to be a significant factor for all but one bidder in the process, a real question of fairness emerges. Moreover, since it is widely accepted that past performance is a critically important indicator, the inability to consider it for any bidder does not serve the government's interests well.

The A-76 revisions deleted coverage of the large, complex web of activities known as Interagency Support Service Agreements, or ISSAs. These are agreements under which one agency provides services to another under a fee for service or reimbursable arrangement. In 1996, recognizing that there appeared to be an unconstrained growth in these completely non-competitive, often hidden agreements, OMB instituted a requirement that all new ISSAs be subjected to competition. In the OMB proposed revisions issued last November, that requirement was expanded to require that all ISSAs be competed.

We recognize that the requirement contained in the November proposal was non-executable and probably unnecessary. However, the final revisions to A-76 have eliminated completely any reference to ISSAs. As such, OMB has effectively rescinded the competition requirement

established in 1996. OMB has indicated that their decision to do so was driven primarily by the fact that no one has any idea of how many such interagency agreements exist, the costs associated with them, or the services they involve. While OMB stated its intent to address these agreements through a separate policy-making initiative, there seems to be no reason to not require that new ISSAs continue to be subjected to competition. To do otherwise is to enable the perpetuation of literally scores of activities that experience little or no oversight, remain largely hidden from public view, and may or may not be in the government's best interests. Thus, we recommend that, at a minimum, OMB reinstate the provision relative to competing new ISSAs, even as the broader policy-making initiative on ISSAs moves forward.

Finally, the revised A-76 requires that OMB approve any deviation from the Circular. This presumably includes waivers of public/private competitions for work currently being performed by government employees, although the Circular makes no mention of waivers at all.

In those cases where a public/private competition makes little or no sense—from the perspective of cost, technical skills, technology, mission, or the agency's ability to adequately support and reward a workforce—a waiver is the right answer. As PSC has previously recommended, in such cases, there should also be a requirement that the interests of the incumbent workforce be a significant source selection factor. As we have seen with the National Security Agency's Groundbreaker contract, the Army's Wholesale Logistics Modernization Initiative, and the Navy Marine Corps Intranet, to name a few, such a strategy can significantly advantage the incumbent workforce while also availing the government of high quality outcomes that might not have been otherwise possible.

For that reason, we believe the Circular should clearly articulate a policy permitting waivers in limited circumstances.

Conclusion

Mr. Chairman, we believe OMB has done a good job of making significant improvements to the A-76 process. One real measure of the success of their efforts will be the degree to which companies that previously would not participate in A-76 competitions decide to do so now. The number that were unwilling to participate, I should add, was growing, as the requirements being competed under A-76 grew more complex and the process continued on a downward spiral. Companies saw, for instance, that protests on A-76 competitions were sustained far more often than those under traditional procurements, a good indicator of the fact that the competitions were simply not being conducted properly, and a good argument in favor of conducting these competitions under the common language of the Federal Acquisition Regulation. In short, the old A-76 process, as the Commercial Activities Panel found, suffered from a terminal case of distrust; it simply had no credibility.

We hope that the revisions OMB has made to the process will help reverse that tide and will lead to robust participation and, even more importantly, to outcomes that are in the best interests of the government. After all, it is the interests of the government and the taxpayer that matter most. We believe that by addressing some of the remaining weaknesses of the process, OMB can help

make that goal a reality. We look forward to working with you, and with OMB, on the road forward.

Thank you for the opportunity to once again share with the Committee the views of the Professional Services Council. I would be happy to answer any questions you might have.